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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ROBERT CARROLL HOLDAWAY, Defendant and Appellant.	B171019 (Los Angeles County Super. Ct. No. NA057653)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tomson T. Ong, Judge. Reversed and remanded.

Joanna Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels and Susan Lee Frierson, Deputy Attorneys General for Plaintiff and Respondent.

Robert Holdaway appeals his conviction for unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a); hereafter section 10851) and receiving stolen property (Pen. Code, § 496, subd. (a).) He claims he was unlawfully detained, and that evidence seized as a result of that detention should have been suppressed. He also claims the evidence is insufficient to support his conviction for violation of section 10851, and that the convictions for driving or taking and for receiving stolen property cannot both stand. In supplemental briefing, he attacks his upper term sentence as violating the Sixth Amendment to the United States Constitution under *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531]. We reverse his conviction and remand for further proceedings.

FACTUAL AND PROCEDURAL SUMMARY

Jay Richie arranged to have his car, a 2000 Nissan Altima, transported from Minnesota to Arizona by Randy's Auto Transport. Just after noon on May 16, 2003, the transport driver parked the trailer at a gas station near the Long Beach airport to pick up another car. He took Richie's car off the trailer and parked it beside the trailer, with the keys inside, while he loaded the other car. When he finished loading that car, he discovered that Richie's car was missing. The driver immediately called the police.

Shortly after midnight on May 21, 2003, Long Beach Police Officer Chris Nguyen saw appellant standing next to the driver's side door of a Nissan Altima parked in the Von's market parking lot. Appellant had one hand on top of the hood and appeared to be trying to get into the vehicle. The car was far from the market entrance, parked diagonally across two spaces. The officer, who was in a marked police car, drove into the parking lot. Appellant made eye contact with him, and immediately walked away from the car toward the main entrance of the market.

Officer Nguyen ran the license plate and was informed the registration was expired. He drove forward to make contact with appellant about the expired registration. Appellant again made eye contact with the officer, and immediately walked away from the store entrance. The officer saw appellant walk down an alleyway between the

Belmont Shore Inn and the market. He drove out of the parking lot and around toward the rear of the motel. He found appellant partially crouched behind the bushes directly across from the rear entrance of the motel.

Officer Nguyen asked appellant to step out from the bushes, and asked him if the vehicle in the Von's parking lot belonged to him. Appellant said no, that the car belonged to a friend of his. He did not know the friend's name or where that person lived. He said he had borrowed the car from a friend "several days ago." Officer Nguyen found a key to the car in appellant's possession. It was later discovered that the license plate on the car belonged to a different vehicle, also a Nissan Altima.

Appellant was arrested and charged by information in count one with unlawful driving and taking a vehicle and in count two with receiving stolen property. It was alleged that appellant suffered a prior strike and served a prior prison term. He was convicted on both counts and sentenced to the upper term on count one, which was doubled as a second strike; an additional year was imposed for the prior prison term. Sentence on count two was stayed pursuant to Penal Code section 654. This is a timely appeal from the judgment of conviction.

DISCUSSION

I

Appellant claims he was unlawfully detained, and that the court erred in denying his motion to suppress evidence seized as a result of that detention. "When, as here, we review a ruling on a defense motion to suppress evidence, we defer to the trial court's factual findings, but we independently apply the requisite legal standard to the facts presented." (*People v. Celis* (2004) 33 Cal.4th 667, 679.) In accordance with this standard of review, we conclude appellant was lawfully detained.

"A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231.)

There are articulable facts in this case from which Officer Nguyen could reasonably suspect that appellant was involved in some activity relating to crime. At the hearing on appellant's motion to suppress, Officer Nguyen testified that he was in a marked police car when he saw appellant in the Von's market parking lot shortly after midnight on May 21, 2003. This was an area Officer Nguyen knew to have a high volume of car burglaries. Appellant had one hand on the driver's side door and the other hand was on the top of the vehicle. It appeared to the officer that appellant was trying to get into the vehicle. Yet as soon as Officer Nguyen drove toward appellant and the two men made eye contact, appellant walked away from the vehicle toward the front entrance of the market.

Officer Nguyen ran the license plate number and was informed that the registration was expired. He turned his vehicle around and attempted to make contact with appellant, who was standing in front of the market. As the officer approached, appellant looked in his direction and walked away from the market. Officer Nguyen followed as appellant walked eastbound on Ocean and went through the parking lot of a motel, out into the rear of the motel, and onto Midway. The officer drove around the motel to the rear, where he saw appellant partially crouched inside a bushy area. It appeared appellant was trying to do something, although the officer did not know what.

Officer Nguyen got out of his police car and asked appellant to step over to the vehicle. The officer had called for backup, but was by himself as he approached appellant. Officer Nguyen ordered appellant to stop; he did not recall whether or not he had his gun drawn at that time. According to Officer Nguyen, at the point when he ordered appellant to stop, appellant was not free to leave, and was detained.

Asked why he detained appellant, Officer Nguyen replied: "First of all, his vehicle [registration] was expired, like I said. He was double parked. All I wanted to do is just ask him if that was his vehicle, tell him to park the vehicle right, tell him about the expired registration. And when he made eye contact and started walking away, based on his actions and the area, because there's high crime of vehicles [being broken] into, burglary, and stolen vehicles, you know, the way he was hiding in the bushes and trying

to avoid the officer, I wanted to make contact with him for further investigation if, in fact, that is his vehicle." One of the officer's concerns was whether the vehicle actually belonged to appellant.

"[E]ven though a person's flight from approaching police officers may stem from an innocent desire to avoid police contact, flight from police is a proper consideration—and indeed can be a key factor—in determining whether in a particular case the police have sufficient cause to detain." (*People v. Souza, supra*, 9 Cal.4th 224, 235.) Here, appellant fled twice after making eye contact with the police officer. First he fled from the side of the vehicle and walked toward the store. When he saw the officer drive toward him, he left the area in front of the store. His conduct this second time was evasive; he walked through a motel, out the back, and into a bushy area. The totality of circumstances, including both instances of appellant's flight, his conduct at the door of the vehicle, and the location of the vehicle in a high car burglary area, provides sufficient articulable facts to support both a subjective and objective belief that there was some criminal activity afoot involving appellant. The detention was lawful, and the court did not err in denying appellant's motion to suppress the evidence resulting from the detention.

II

Appellant claims the evidence is insufficient to support his conviction for taking or driving a vehicle. Section 10851, subdivision (a) defines the charged crime: "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or

unauthorized taking or stealing, is guilty of a public offense . . . ."[1] "'Where recently stolen property is found in the conscious possession of a defendant who, upon being questioned by the police, gives a false explanation regarding his possession or remains silent under circumstances indicating consciousness of guilt, an inference of guilt is permissible. The jury is empowered to determine whether or not the inference should be drawn in light of all of the evidence. [Citation.] Specific intent to deprive the owner of possession of his car may be inferred from all the facts and circumstances of the particular case. Once the unlawful taking of the vehicle has been established, possession of the recently taken vehicle by the defendant with slight corroboration through statements or conduct tending to show guilt is sufficient to sustain a conviction of Vehicle Code section 10851. [Citation.]' [Citations.]" (*People v. Green* (1995) 34 Cal.App.4th 165, 180-181.)

The evidence was that the vehicle was owned by Jay Ritchie, who had hired Randy's Transport to transport the car to Arizona. The car had been taken from the car transport at a gas station near the Long Beach airport, without permission, on May 16, 2003. Four and a half days later, the car was found parked at a Von's parking lot in Long Beach. Appellant was standing at the driver's side door of the vehicle. He had one hand on top of the car hood, and with the other hand it appeared he was trying to get into the vehicle. Appellant fled immediately upon seeing Officer Nguyen drive up in a marked police car. Appellant was soon detained and questioned. He told Officer Nguyen the car was not his, that it belonged to a friend of his. He did not know the friend's name or where the friend lived. He said the friend gave him the vehicle "several days ago." The key to the car was found in appellant's pocket.

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[1] Although the amended information charged appellant with driving *and* taking a vehicle, the jury was instructed that a violation of section 10851 requires proof that a person "took *or* drove a vehicle" belonging to another person without consent. (Italics added.) The verdict form also described the crime charged as "unlawful driving *or* taking of a vehicle . . . ." (Italics added.)

From this evidence, the jury could conclude appellant either had taken the car from the transport, or had driven the car after it was taken. Appellant's evasive behavior when Officer Nguyen arrived in the parking lot supported the conclusion that appellant knew the car was not his and that the owner had not consented to his driving or taking the car, and that appellant intended to deprive the owner of possession of the car either permanently or temporarily. The evidence was sufficient.

III

Appellant argues he was improperly convicted of both stealing and receiving the same property. Penal Code section 496 provides: "(a) Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a state prison, or in a county jail for not more than one year. . . . [¶] A principal in the actual theft of the property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this section and of the theft of the same property."

Section 10851 can be violated either by taking a vehicle with the intent to steal it, or by driving it with the intent only to temporarily deprive its owner of possession. (*People v. Allen* (1999) 21 Cal.4th 846, 851.) If the record establishes that the jury based its finding on driving with intent only to temporarily deprive the owner of possession, conviction under both section 10851 and Penal Code section 496 is permissible. (See *People v. Austell* (1990) 223 Cal.App.3d 1249, 1252.) But if the record permits and does not rebut "an inference that the jury might have based its verdict of violating section 10851 on a finding that the defendant took the vehicle with the intent to permanently deprive its owner of title or possession," the common law rule that a person may not be convicted of stealing and receiving the same property precludes conviction for both crimes. (*People v. Allen, supra*, 21 Cal.4th at pp. 851-852; *People v. Jaramillo* (1976) 16 Cal.3d 752, 757-759.)

In our case, we cannot determine from the record whether the jury based its guilty finding for section 10851 on appellant driving or taking the vehicle. As we have explained, appellant's statement to Officer Nguyen that a friend loaned him the car several days earlier could support the conclusion that appellant was the individual who took the car from the gas station. Evidence that the license plate on the vehicle had been changed after the vehicle was taken does not negate the possibility that appellant was the person who took the vehicle. The prosecutor argued to the jury that appellant was the car thief. Unlike *People v. Cratty* (1999) 77 Cal.App.4th 98, 103 and *People v. Strong* (1994) 30 Cal.App.4th 366, 374), in which the defendants were arrested while driving the vehicle, there is no direct evidence in this case that appellant drove the stolen car. Nothing in the verdict forms indicates that the conviction under section 10851 was based only on appellant driving the car. At the sentencing hearing the prosecutor expressed the uncertainty about whether the jury found appellant took the car: "We don't know whether the jury found he took it and drove it, but I would suggest that it's not a far conclusion to think that he took it and had it the entire time."

"When . . . the record does not disclose or suggest what specific findings were made in convicting a defendant of a violation of Vehicle Code section 10851 but it nevertheless appears that the fact finder may have found that the defendant intended to steal the vehicle, a second conviction based on a further finding that the defendant received that same stolen property is foreclosed." (*People v. Jaramillo, supra*, 16 Cal.3d at p. 759.) Following *Jaramillo*, we conclude that the judgment must be reversed as to both convictions, and the cause remanded for the People to make an election as to whether to retry appellant on either or both counts. If no election is made within 30 days of the finality of this decision, the trial court is directed to reinstate the conviction for violation of section 10851 only, and to enter judgment accordingly. (See *Jaramillo*, at p. 760.)

IV

The trial court imposed the upper term for appellant's conviction for violation of section 10851. Relying on *Blakely v. Washington, supra*, 124 S.Ct. 2531 (*Blakely*),

appellant claims he was denied his constitutional right to have a jury decide all facts necessary for imposition of this sentence. In the event the People elect not to retry appellant, this conviction will be reinstated. For that reason, we consider the validity of the court's sentencing choice.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court held: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely*, the Supreme Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . . In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (124 S.Ct. at p. 2537.) It appears that the holding applies to all cases not yet final when *Blakely* was decided in June 2004. (See *Schriro v. Summerlin* (2004) ___ U.S. ___ [124 S.Ct. 2519].)

We agree with appellant's assertion that *Blakely* applies to the California determinate sentencing law.[2] Under Penal Code section 1170, subdivision (b), "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." Circumstances in aggravation cannot include a fact on which an enhancement is based or a fact which is an element of the underlying offense. (Cal. Rules of Court, rule 4.420 (c) & (d).) Like the "standard range" in the Washington sentencing scheme considered in *Blakely*, the middle term under California law is the maximum

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[2] We are familiar with the recent United States Supreme Court case of *United States v. Booker* (2005) ___ U.S. ___ [125 S.Ct. 738], which addresses the impact of *Blakely* on the federal sentencing guidelines. We note the California Supreme Court has requested further briefing in *People v. Black* (S126182) on the application of *Booker* to the California sentencing scheme. Pending further guidance, we adhere to the position we have taken, that *Blakely* applies to the California determinate sentencing law.

sentence the court can impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. . . ." (*Blakely*, *supra*, 124 S.Ct. 2531, 2537.)

In our case, the court imposed the upper term based on several factors in aggravation: "This court is convinced that there is a measure of . . . sophistication and planning in switching the license plate. What they basically do in this particular case, what it was attempted to be done was try to get a cold plate from another car so that the stolen car cannot be detected with the cold plate in this particular case. I'm not so sure that the prior convictions are of increasing seriousness although this court is convinced that after 1996, if he picked up two other cases, it's a sufficiency of number whether it is numerous or not, it is true he served a state, federal prison term and was on a probation when he committed the crime. It is true that his performance on probation or parole, obviously, as a result of this conviction is unsatisfactory."

The fact that appellant was on probation when he committed this crime, and that his performance on probation or parole was unsatisfactory could be used to increase the statutory maximum sentence without a jury determination of that fact. (See *Almendarez-Torres v. U.S.* (1998) 523 U.S. 224.) But if the trial court relies on non-recidivist factors to support a high term, appellant is entitled to have a jury determine the other facts on which the court relied, such as whether the offense showed sophistication and planning. Use of those facts to impose the upper term does not comply with the Sixth Amendment and there is no basis on this record to conclude that the court would have imposed the upper term on the basis of the probation status and unsatisfactory performance factors alone. On remand, if appellant's conviction for violation of section 10851 is reinstated, the trial court must decide whether the recidivist factors alone justify a high term.

DISPOSITION

The judgment is reversed and the cause remanded for further proceedings consistent with the views expressed in this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P.J.

I concur:

CURRY, J.

GRIMES, J., Concurring and Dissenting.

I concur in parts I, II, and III of the majority opinion. Respectfully, I dissent with respect to the disposition and discussion in part IV, which addresses the issue of whether *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*) mandates reversal of the upper term imposed on appellant's conviction for unlawful driving or taking of a vehicle (count 1) and remands for resentencing on that count.

My colleagues conclude that "[l]ike the 'standard range' in the Washington sentencing scheme considered in *Blakely*, the middle term under California law is the maximum sentence the court can impose 'solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. . . .' (*Blakely, supra*, 124 S.Ct. 2531, 2537.)" (Maj. opn. at p. 10.) I disagree.

Until our Supreme Court concludes otherwise,[1] I am of the opinion that *Blakely* does not apply to the tripartite prison scheme (upper, middle, and low term) of the California determinate sentencing law (Pen. Code, § 1170, subds. (a)(3) & (b); see also, Cal. Rules of Court, rules 4.420(a)-(c), 4.421 & 4.423). It is my view that our California sentencing scheme is the type of discretionary sentencing within a range authorized by law to which *Blakely* does not apply.

In view of the foregoing, I would conclude that, if appellant's conviction for violation of section 10851 is reinstated, then the upper term sentence should be affirmed without the requirement of another sentencing hearing.

GRIMES, J.*

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[1] The issue of whether *Blakely* applies to the upper term choice is pending before our Supreme Court in *People v. Black*, S126182 and *People v. Towne*, S125677.

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.